

Respondent further argues the claimant did not meet her burden of proof to establish a work disability and should therefore be limited to a 20 percent functional impairment.

Conversely, claimant argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a supervisor in the parts department for Rusty Eck Ford in 1991. Claimant would pull parts all day long and then load the trucks for the four different driver's routes. On November 17, 1998, claimant was pulling hoods and a bumper while going up an incline when she felt a pain in her back. The claimant was provided conservative treatment which consisted of injections, a TENS unit and also physical therapy.

After failed conservative treatment, on January 28, 2002, Dr. Pollock performed a decompression of L4-5 and L5-S1, discectomy at L5-S1 and posterior fusion from L4-S1 on claimant's lumbar spine. Unfortunately, the claimant's symptoms of low back pain with radiculopathy down her right leg persisted after the surgery. Claimant was prescribed additional epidural steroid injections as well as physical therapy. Finally, Dr. Pollock recommended a trial with a spinal cord stimulator to address claimant's chronic pain complaints.

The ALJ referred claimant to Dr. Paul S. Stein for treatment recommendations and if no further treatment was recommended then to provide a rating and restrictions. On September 29, 2003, Dr. Stein concluded that while he would not rule out the possibility that claimant might someday be an appropriate candidate for a spinal cord stimulator, nonetheless, he would not recommend such device at that time. Dr. Stein rated claimant in DRE Lumbosacral Category IV for a 20 percent whole person functional impairment.

Dr. Stein imposed restrictions that claimant avoid activity that requires repetitive bending and twisting, lifting more than 20 pounds occasionally or 10 pounds more often and activity which requires standing or walking for more than one hour at a time or more than a total of four hours in an eight-hour work day. The doctor further recommended a functional capacity evaluation for more definitive restrictions. After the functional capacity evaluation was performed, Dr. Stein adopted those restrictions which placed claimant in a sedentary capacity.

When the treatment option of the spinal cord stimulator was denied by the insurance carrier, Dr. Pollock concluded claimant had reached maximum medical improvement. Doctor Pollock opined that because of her continued pain the claimant was essentially and realistically unemployable. The doctor noted that because claimant must be able to get up and move around and lay down on occasion that she is essentially and realistically unemployable. The doctor testified:

Q. Okay. Even if she was offered a sedentary job, however, though, Doctor, she would be required again to be able to get up and move around and lay down on occasion; is that correct?

A. Probably. Unless the individual -- unless her employer was very understanding, I think.

Q. And that's what makes her essentially realistically unemployable?

A. Yes.

MS. BENJAMIN: Objection, leading.

A. If -- she could do a sedentary job that required lifting 10 pounds and no bending. Whether she could sit at the job all day rooted to a spot, I'm not sure; she probably would have to get up and move around. Lying down, well, it's difficult; probably she can't lie down on the job and probably not realistic.

Q. Would she -- does she have the requirement to be able to take her pain medication during the day, also?

A. Well, she would have to -- probably if she could do that and function, then she might -- she would probably need that.¹

At the time of the regular hearing, claimant was 50-years-old with an 11th grade education and receiving Social Security disability benefits. Claimant testified she is only able to sleep a few hours a night and cannot stand or sit for extended periods of time. Claimant continues to have constant pain and takes the pain medication Carisoprodol as well as 800 milligrams of Ibuprofen daily. Claimant testified she is not able to work because she needs pain medication, the TENS unit and has to elevate her legs as well as lay down and nap during the day.

Dr. Stein agreed that claimant's pain complaints and inability to sleep were consistent with the condition she was in when he examined her. And that claimant's need for pain medication was also consistent with her physical condition. Lastly, Dr. Stein

¹ Pollock Depo. (May 17, 2004) at 16-17.

agreed claimant would have difficulty finding employment based upon her taking pain medications and her need to nap and lay down during the day.

The claimant's vocational expert, Mr. Jerry D. Hardin, opined that even if claimant was offered a sedentary job, the fact that she has to occasionally lie down on an as-needed basis during the day would prevent her from any employment.

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.²

The ALJ determined claimant was permanently totally disabled and noted in her Award:

Claimant's un rebutted testimony indicates that the effects of her injury are so severe that she is incapable of engaging in any type of substantial and gainful employment. She has not worked since March 30, 1999 when Dr. Pollock found her temporarily and totally disabled from working. Following her back surgery on January 28, 2002, Claimant has remained in treatment with Dr. Pollock. The regular hearing was conducted approximately two and a half years after Claimant's surgery. During the regular hearing, Claimant testified that the effects of her work injury still remain with her: she is unable to sleep at night; she has constant pain; she has severe cramps in her legs and back which interfere with sleep; she is unable to do housework or recreational activities; she must take pain medication during the day and frequent naps.

The Board agrees and adopts the ALJ's conclusions with the exception that claimant's testimony regarding her inability to work was controverted by Dr. Stein's testimony that claimant could perform sedentary work.

² *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In this case, both Dr. Pollock as well as the vocational expert, Mr. Hardin, have offered opinions that claimant is realistically unemployable. The Court, in *Wardlow*³, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The same circumstances led Dr. Pollock and Mr. Hardin to conclude the claimant was realistically unemployable. The Board finds claimant is realistically and essentially unemployable and has met her burden of proof to establish that she is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 10, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).